Dato' Fathi bin Hj Ahmad v Standard Chartered Bank Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–03–89 OF 1996
MOKHTAR SIDIN, RICHARD MALANJUM AND MOHD GHAZALI JJCA
15 DECEMBER 2005

Bankruptcy — Practice and procedure — Amendments — Amendments sought to substitute name of foreign bank with name of locally incorporated bank in bankruptcy proceedings — Whether such amendments proper under rr 274 and 276 of the Bankruptcy Rules 1969

Bankruptcy — Practice and procedure — Bankruptcy notice and petition — Parties — Foreign bank transferred and vested all banking business in Malaysia to locally incorporated bank — Vesting order made pursuant to s 50(1) of Banking and Financial Institutions Act 1989 — Bankruptcy notice and petition issued in the name of foreign bank — Application by foreign bank to substitute its name with name of locally incorporated bank — Whether application proper — Whether application ought to be allowed — Banking and Financial Institutions Act 1989, s 50(1)

Civil Procedure — Judgments and orders — Vesting order — Vesting order under to s 50(1) of Banking and Financial Institutions Act 1989 — Effect of — Whether foreign bank need to substitute successor bank as plaintiff in all matters relating to foreclosure proceedings initiated earlier pursuant to O15 r 7(2) of Rules of the High Court 1980 — Rules of the High Court 1980 O15

Pursuant to the Banking and Financial Institutions Act 1989 ('BAFIA'), the Standard Chartered Bank ('SCB') was required to incorporate a Malaysian company to take over its banking business in Malaysia. The Standard Chartered Bank Malaysia Bhd ('the SCBMB') was thus incorporated. On 28 April 1994, SCBMB obtained a vesting order from the High Court pursuant to s 50 of BAFIA vesting all judgments obtained by SCB to SCBMB. In the instant case, SCB obtained judgment against the debtor in 13 June 1987. A bankruptcy notice was served on the debtor on 28 September 1992. The debtor applied to set aside the bankruptcy notice and his notice was dismissed by the High Court on 27 June 1995. SCB thereafter filed its creditor's petition on 5 September 1995. On 28 August 1996, SCB applied to amend the creditor's petition and all subsequent proceedings by substituting the name SCB with SCBMB. Counsel for the debtor objected to the application, submitting inter alia that SCB was not a creditor and had no locus standi to present the creditor's petition. Counsel further submitted that SCB was not a creditor after 28 April 1994 because all assets and liabilities of SCB had been vested with SCBMB. The creditor's application was allowed by the High Court and the debtor appealed.

Held, dismissing the appeal:

(1) The vesting order permitted the SCB to continue with the proceedings under its name or alternatively to formalize the proceedings by amending the name of SCB to SCBMB. There was nothing in the vesting order to stop them from doing so because the creditor's petition was a continuation of proceedings from the judgment obtained or at the very least a continuation of the bankruptcy notice (see para 8).

(2) Section 50(1)(j) and (k) and paragraphs 2(k) and (l) of the vesting order made provisions for pending legal proceedings. The provisions made clear that SCBMB could step into the shoes of SCB without any legal obstacles. In the instant case, the bankruptcy notice was issued in the name of SCB because it was done before the vesting order was made. It was only proper therefore for SCB to be the petitioner in the petition. To formalize proceedings SCB applied to amend the creditors petition to substitute SCBMB's name for SCB (see para 11).

(3) SCBMB could not be named as a judgment creditor because the bankruptcy notice was in the name of SCB. After all the requirements had been met by SCB and the creditor's petition had been filed, it was only appropriate for SCB to amend the petition by substituting the name of SCBMB for SCB. With the amendment it would be easier and convenient for the receiver to deal with the locally incorporated SCBMB. The amendment was not due to any error or mistake but to give effect to the vesting order (see para 15).

(4) In the instant case, the trial judge was correct in applying rr 274 and 276 of the Bankruptcy Rules 1969 to justify the amendments made (see para 16).

[Bahasa Malaysia summary

Menurut Akta Bank dan Institusi-Institusi 1989 ('BAFIA'), Standard Chartered Bank ('SCB') dikehendaki menubuhkan syarikat Malaysia untuk mengambil alih perniagaan perbankannya di Malaysia. Oleh itu, Standard Chartered Bank Malaysia Bhd ('SCBMB') telah ditubuhkan. Pada 28 April 1994, SCBMB telah mendapat perintah letak hak daripada Mahkamah Tinggi menurut s 50 BAFIA yang meletakhak semua penghakiman yang diperoleh oleh SCB kepada SCBMB. Dalam kes semasa, SCB memperoleh penghakiman terhadap penghutang pada 13 Jun 1987. Satu notis kebankrapan telah disampaikan ke atas penghutang pada 28 September 1992. Penghutang telah memohon untuk mengenepikan notis kebankrapan itu dan notis beliau telah ditolak oleh Mahkamah Tinggi pada 27 Jun 1995. SCB kemudian telah memfailkan petisyen pemiutangnya pada 5 September 1995. Pada 28 Ogos 1996, SCB telah memohon untuk meminda petisyen pemiutang dan semua prosiding berikutnya dengan menggantikan nama SCB kepada SCBMB. Peguam bagi pihak penghutang membantah permohonan itu, dengan berhujah, antara lain, bahawa SCB bukan pemiutang dan tiada locus standi untuk mengemukakan petisyen pemiutang. Peguam seterusnya berhujah bahawa SCB bukan pemiutang selepas 28 April 1994 kerana semua aset dan liabiliti SCB telah diletakhak kepada SCBMB.

Permohonan pemiutang telah dibenarkan oleh Mahkamah Tinggi dan penghutang merayu.]

Diputuskan, menolak rayuan tersebut:

(1) Perintah letak hak membenarkan SCB meneruskan prosiding di bawah namanya atau secara alternatif merasmikan prosiding dengan meminda nama SCB kepada SCBMB. Tiada apa-apa dalam perintah letak hak itu yang menghalang mereka daripada berbuat demikian kerana petisyen pemiutang adalah sambungan prosiding daripada penghakiman yang diperoleh atau setidak-tidaknya sambungan daripada notis kebankrapan itu (lihat perenggan 8).

(2) Seksyen 50(1)(j) dan (k) dan perenggan 2(k) dan (l) perintah letak hak memberi peruntukan sementara menunggu prosiding undang-undang selesai. Peruntukan itu jelas bahawa SCBMB boleh bertindak sebagai SCB tanpa apa-apa halangan undang-undang. Oleh tiu adalah betul untuk SCB dijadikan pempetisyen dalam petisyen. Untuk merasmikan prosiding SCB memohon untuk meminda petisyen pemiutang untuk menggantikan nama SCBMB kepada SCB (lihat perenggan 11).

(3) SCBMB tidak boleh dinamakan sebagai pemiutang penghakiman kerana notis kebankrapan adalah atas nama SCB,. Setelah semua keperluan dipenuhi oleh SCB dan petisyen pemiutang telah difailkan, adalah sesuai untuk SCB untuk meminda petisyen itu dengan menggantikan nama SCBMB kepada SCB. Dengan pindaan tersebut, ia lebih mudah untuk penerima berurusan dengan SCBMB tempatan. Pindaan itu bukan disebabkan oleh apa-apa kesilapan tetapi untuk menguatkuasakan perintah letak hak itu (lihat perenggan 15).

(4) Dalam kes semasa, hakim perbicaraan yang bijaksana adalah betul apabila menggunakan kk 274 dan 276 Kaedah-Kaedah Kebankrapan 1969 untuk mejustifikasikan pindaan tersebut (lihat perenggan 16).

Notes

For cases on amendments generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2831–2884.

For cases on bankruptcy notice and petition, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2844–2848.

For cases on vesting order generally, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index, paras 3619–3626.

Cases referred to

Leong Moh Sawmill Co Sdn Bhd (in liquidation) v Standard Chartered Bank & Ors [1996] 2 MLJ 614 (refd)

M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 49(7), 50(1)(j), (k), (3)

Bankruptcy Act 1967 ss 4, 5(1)(c), 6

Bankruptcy Rules 1969 rr 274 and 276
National Land Code 1965 s 258(1)(b), (2)(a), Form 16F

Saranjit Singh (Rehana Abd Karim with him) (Vasdev Bakshani & Associates) for the appellant.
Lorraine Cheah (Shearn Delamore & Co) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court):

[1] The present appeal arose from an application by the respondent by way of a summons in chambers dated 23 August 1996. The application stated in the summons in chambers is as follows:

(1) That the petitioner be granted leave to amend the creditors petition and all subsequent proceedings by amending the name of 'Standard Chartered Bank' to 'Standard Chartered Bank Malaysia Bhd' and as per the amendments underlined in red in the annexture, annexed to this summons in chambers and marked as Annexture 'A'.

(2) That the petitioner be granted an extension of time to file an affidavit vrifying the amended petition affirmed by an officer of the Standared Chartered Bank Malaysia Bhd.

[2] Both the senior assistant registrar and the learned judge allowed the application. We have dismissed the appeal earlier. We now give our reasons for doing so.

[3] The affidavit in support of the application disclosed that Standard Chartered Bank obtained judgment against the appellant on 13 June 1987. On 6 August 1992, Standard Chartered Bank made a request for the issuance of a bankruptcy notice when the appellant failed to pay the judgment sum obtained on 13 June 1987. Pursuant to that request, on 5 September 1995, Standard Chartered Bank presented a creditor's petition against the appellant.

[4] Under the Banking and Financial Institutions Act 1989 (BAFIA), Standard Chartered Bank was required to incorporate a Malaysian company to take over the conduct of its banking business in Malaysia. As a result, Standard Chartered Bank Malaysia Bhd was incorporated. On 28 April 1994, Standard Chartered Bank Malaysia Bhd obtained a vesting order from the High Court, Kuala Lumpur, pursuant to s 50 of BAFIA. With that 'vesting order' all judgments obtained by Standard Chartered Bank would be assigned to the newly incorporated Standard Chartered Bank Malaysia Bhd.

[5] When the judgment was obtained by Standard Chartered Bank against the appellant on 13 June 1987, Standard Chartered Bank Malaysia Bhd was not in existence yet. Even when the bankruptcy notice was issued on 6 August 1992, Standard Chartered Bank Malaysia Bhd had not been incorporated. The bankruptcy notice was served on the appellant on 28 September 1992, also before the incorporation of Standard Chartered Bank Malaysia Bhd. On 1 October 1992, the appellant filed an application to set aside the bankruptcy notice. This application was finally disposed of on 27 June 1995, when it was dismissed by the High Court. As a

result of that dismissal Standard Chartered Bank filed the creditor's petition on 5 September 1995. By then Standard Chartered Bank Malaysia Bhd had been incorporated and the vesting order dated 28 April 1994 was given. As a result of that the respondent/petitioner (Standard Chartered Bank), on 28 August 1996, made an application by way of a summons in chambers to amend the creditor's petition and all subsequent proceedings in that the name of Standard Chartered Bank be substituted with the name of Standard Chartered Bank Malaysia Bhd which is the subject matter of this appeal. The respondent also applied for extension of time to file an affidavit verifying the amended petition. The appellant objected to this application. The High Court dismissed the objection and allowed the application by the respondent.

[6] The learned counsel for the appellant submitted that Standard Chartered Bank was not a creditor and had no locus standi or statutory right to present the creditor's petition. He stated that a bankruptcy proceeding commences by filing a creditor's petition. For that purpose the petitioner is obliged to satisfy the strict requirements of ss 5 and 6 of the Bankruptcy Act 1967, in that the conditions precedent in particular the issuance of the creditor's petition and bankruptcy jurisdiction. In other words, the appellant is stating that bankruptcy jurisdiction will not be available to persons who are not creditors of the debtor at the time of presentation of the petition. Only a creditor has locus standi to present a creditor's petition. The learned counsel for the appellant further submitted that Standard Chartered Bank was not a creditor after 28 April 1994 because all assets and liabilities of Standard Chartered Bank had been vested with Standard Chartered Bank Malaysia Bhd. The learned counsel for the appellant cited the case of *Leong Moh Sawmill Co Sdn Bhd (in liquidation) v Standard Chartered Bank & Ors* [1996] 2 MLJ 614. According to the appellant, the effect of the vesting order is to create a separate and new entity in the name of Standard Chartered Bank Malaysia Bhd and not a mere change of name whereby all assets and liabilities of Standard Chartered Bank be taken over by Standard Chartered Bank Malaysia Bhd. As such, according to the appellant, Standard Chartered Bank is no longer a creditor of the appellant. We agree with the first part but not the second. The effect of the vesting order had been explained by this court in *Leong Moh Sawmill*'s case. As can be seen from that case, the issue raised in that case involved the same vesting order and the same banks. It is also noted that the solicitors acting for the appellant in that case are the same solicitors acting for the appellant in the present appeal.

[7] In *Leong Moh Sawmill*, the appellant who was the registered proprietor of two parcels of land ('the lands') charged the lands to Standard Chartered Bank ('the predecessor bank') to secure loans granted to it. The appellant then defaulted, and the predecessor bank instituted foreclosure proceedings against the appellant. On 4 October 1985, the predecessor bank obtained an order of court to sell the lands by way of public auction. On the eve of the auction, the parties agreed to adjourn the auction indefinitely to enable the matter to be settled out of court. However, the negotiations for settlement failed. The predecessor bank accordingly filed a summons in chambers for a fresh auction date and further directions for sale. Meanwhile, the predecessor bank, which was a foreign bank, had transferred and vested all its banking business in Malaysia to Standard Chartered Bank Malaysia Bhd ('the

successor bank'), a separate legal entity incorporated locally, pursuant to a sale and purchase agreement, and after obtaining the approval of the Minister of Finance under s 49(7) of BAFIA. The court had also granted a vesting order to the successor bank under s 50(1) of BAFIA, and fixed 1 July 1994 as the effective date for the transfer of the business. Subseqently, the summons-in-chambers filed by the predecessor bank earlier was heard, and the court fixed 13 March 1995 as the new auction date. All proceedings in this matter continued in the name of the predecessor bank as the plaintiff. At the auction, the second and third respondents bidded successfully for the lands, and they paid 10% of the purchase price. The proclamation of sale still had the predecessor bank as the plaintiff. On 3 April 1995, the appellant filed an application to set aside the auction and to annul the sale of the lands, on the grounds that: (i) the failure by the predecessor bank to cite the successor bank as the plaintiff in the proclamation of sale issued pursuant to the directions for sale constituted a breach of s 258(1)(b) and (2)(a) of the National Land Code 1965 ('the NLC'); (ii) that breach amounted to an impropriety in the subsequent conduct of the sale within the meaning enunciated in *M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 ('*Siland*'s case') so as to entitle the appellant as the chargor to nullify the sale; and (iii) the illegal sale had prejudiced the appellant's right to redeem the lands. The trial judge held that s 258(1)(b) and (2)(a) of the NLC had not been breached, and that there was no improper conduct as envisaged by *Siland*'s case. The appellant's application was dismissed with costs, and the issuance of Form 16F in favour of the second and third respondents stayed. The appellant appealed. The issue which arose was whether the predecessor bank could continue to pursue proceedings in its name after it had already sold and vested all its banking business in Malaysia to the successor bank. The Court of Appeal dismissed the appeal and held that the vesting order was such that there was no requirement in law to effect a substitution of the plaintiff, and its effect was that the successor bank was deemed to be a party in all proceedings that were initiated by and commenced against the predecessor bank. This meant that the successor bank was very much a party to the order of sale obtained. The court also held that s 50(3) of BAFIA provides, inter alia, that the transfer of any property or business pursuant to the order of the High Court under sub-s (1) shall on and from the transfer date become vested in or held by the transferee, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law. Thus, by virtue of the vesting order, there had been a transmission of interest from one legal entity to another. Siti Norma Yaakob JCA (as she then was), delivering the judgment of the court, at pp 623–625 said:

> Clearly, we do not see how the provisions of s 258(1)(a) and (2)(b) of the NLC have been breached by the predecessor bank as all procedural steps laid down by the two sub-sections have been adhered to by the predecessor bank through the court-appointed auctioneer and the SAR. However, what remains to be determined is whether the alleged impropriety of not amending the heading of the proceedings to disclose the name of the successor bank as the chargee in the proclamation of sale is the sort of impropriety envisaged by *Siland*'s case.
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> We say 'no' for the following reasons.
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> The vesting order of 28 April 1994 was such that there is no requirement in law to effect a substitution of the plaintiff. Paragraph 2(d) of the order states that any reference to the predecessor bank in any existing instrument of any nature vesting any title, assets or liability on the predecessor bank shall, without any further act by the predecessor bank, be construed

as if the reference has been substituted with a reference to the successor bank with effect from 1 July 1994. Paragraph 2(k) of the vesting order also states that where any right or liability of the predecessor bank is to be transferred to the successor bank, then the latter shall, without any further act of the former, have the same rights, powers and remedies like commencing or defending any legal proceedings including rights and liabilities in respect of any legal proceedings pending before 1 July 1994 by or against the predecessor bank.

Likewise, para 2(1) of the vesting order which states that any judgment or award obtained by or against the predecessor bank and which was not complied with or yet to be satisfied shall — with effect from 1 July 1994, and without any further act of the predecessor bank — be enforceable by or against the successor bank as if the latter had become a party to the judgment or award. We consider that the effect of this particular order is that the successor bank is deemed to be a party in all proceedings that were initiated by or commenced against the predecessor bank, and for practical purposes, this means that the successor bank is very much a party to the order of sale obtained on 4 October 1985.

It was pursuant to the various paragraphs in the vesting order that we have singled out that the trial judge likened the situation of the predecessor bank leaving its shell and the successor bank filling in the space left vacant by the predecessor bank. Thus, the transfer of business was to take place without any further administrative acts to be done by either the predecessor bank or the successor bank.

The vesting order was made under s 50(1) of the Act and sub-s (3) of the same section states as follows:

> (3) Where the order of the High Court under sub-section (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

The only written law dealing with parties to an action is found in the Rules of the High Court 1980, and O 15 r 7(2) specifically deals with the change of parties under certain circumstances. For ease of reference, we reproduce that particular order and rule:

> (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.

Thus, by virtue of the vesting order, there has been a transmission of interest from one legal entity to another and under the provisions of O 15 r 7(2), there may be a substitution of the proper party to continue with the proceedings. However, by virtue of the qualifying words 'notwithstanding anything in any law or in any rule of law' appearing in s 50(3) of the Act, we consider that there is no necessity for a formal order under O 15 r 7(2) to regularize the position of the successor bank. If indeed there was any irregularity committed by the predecessor bank, it was merely its failure to withdraw and allow the sale to be conducted by the successor bank. That can be achieved by the mere production of the vesting order. In any event that omission, we consider, is not the sort of impropriety envisaged by the Siland's case, where the conduct sought

to be impugned amounts to a reckless disregard to the interests of an interested party. That cannot be the case here as what is being challenged is not the interest of any party but the wrong use of a name which — by virtue of the particular provisions of the vesting order, which we have already averred to, and the provisions of s 50(3) of the Act — cannot have the effect of rendering the proclamation of sale improper and the subsequent sale annulled. (Emphasis added.)

[8] It is clear from the above that the vesting order permits Standard Chartered Bank to continue with its proceedings under its name, or alternatively it could formalise the proceedings by amending the name of Standard Chartered Bank to Standard Chartered Bank Malaysia Bhd. There is nothing in the vesting order to stop them from doing so because, as we have stated earlier, the creditor's petition is a continuation of proceedings from the judgment obtained or at the very least a continuation of the bankruptcy notice. The respondent in the present appeal elected to formalise the proceedings by applying to amend the name of the respondent. We wish to add that it is most appropriate for the respondent to do so because otherwise the solicitors for the appellant would raise the same issue that they did in *Leong Moh Sawmill*'s case.

[9] The learned counsel for the appellant had cited numerous authorities to show that no amendment should be allowed to cure a nullity in bankruptcy proceedings. Apparently, the nullity complained by the appellant's counsel was that of the vesting order dated 28 April 1994, Standard Chartered Bank (the predecessor bank) had no more rights over the judgment debt of the appellant. It was submitted that Standard Chartered Bank had no more interest in the judgment debt from the date of the vesting order. With the greatest respect to the appellant's counsel we see no merit in this submission. As decided in *Leong Moh Sawmill*'s case the right or interest continue to exist except it is now vested with Standart Chartered Bank Malaysia Bhd. It is pertinent here to cite paras 2(k) and 2(l) of the vesting order:

> 2. That further the transfer and vesting of all the 'Business' (as defined by the Said Agreement) of the Transferor to the Transferee, be and is hereby facilitated and given effect to, effective from the 1st of July 1994 or such extended date as agreed to by the Transferor and Transferee in writing (hereinafter referred to as 'The Transfer Date') in the manner set out hereinafter:
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> ...
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> (k) that where any right or liability of the Transferor is to be transferred to the Transferee, then the Transferee shall, without any further act or deed of the Transferor, on and with effect from the Transfer Date, have the same rights, powers and remedies which (and in particular, the same rights and powers as to commencing and defending legal proceedings or making and opposing applications to any authority) for ensuring, preserving or enforcing a right or repudiating a liability, as if at all times it had been a right or liability of the Transferee, including those rights and liabilities in respect of any legal proceedings or applications to any authority pending immediately before the Transfer Date by or against the Transferor;
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> (l) that any judgment or award obtained by or against the Transferor and which was not complied with or yet to be fully satisfied before the Transfer Date shall and will, without any further act or deed of the Transferor, on and from the Transfer Date, be enforceable by or as the case may be, against the Transferee as if the Transferee were a party to the said judgment or award;

[10] Sections 50(1)(j) and (k) of BAFIA also provide similar rights:

> 50. Application to High Court to facilitate agreement or arrangement for transfer of whole or part of business of licensed institution being given effect to.
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> (1) Where the Minister has granted his approval under section 49(7) to an application in respect of an agreement or arrangement under section 49(1)(b) or (c), the licensed institution whose business is to be transferred (hereinafter referred to as 'the transferor') and the licensed institution or other person to whom the transfer is to be made (hereinafter referred to as 'the transferee') may make a joint application to the High Court by way of an ex parte originating summons for such order of the Court as may be required by them to facilitate or enable the agreement or arrangement being given effect to, and in such application there may be sought all or any of the following orders:
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> ...
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> (j) where any right or liability of the transferor is transferred to the transferee, for the transferee to have the same rights, powers and remedies (and in particular the same rights and powers as to taking or resisting legal proceedings or making or resisting applications to any authority) for ascertaining, protecting or enforcing that right or resisting that liability as if it had at all times been a right or liability of the transferee, including those rights or liabilities in respect of any legal proceedings or applications to any authority pending immediately before the transfer date by or against the transferor;
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> (k) any judgment or award obtained by or against the transferor and not fully satisfied before the transfer date to be enforceable by or, as the case may be, against the transferee; and

[11] It is clear to us that both s 50(1)(j) and (k) of BAFIA and paras 2(k) and (l) of the vesting order made provisions for pending legal proceedings. The provisions made it clear that the transferee which in this case is Standard Chartered Bank Malaysia Bhd may step into the shoes of the transferor which in this case is Standard Chartered Bank without any legal obstacles. We have explained earlier that the creditor's petition was instituted pursuant to the bankruptcy notice. The bankruptcy notice was issued in the name of Standard Chartered Bank because it was done before the vesting order was made. Due to an application by the appellant to set aside to the bankruptcy notice, which was found to be groundless, the creditor's petition could not be filed before the vesting order was made. In our view, it is only proper that Standard Chartered Bank should be the petitioner in the petition because the bankruptcy notice was in its name. To formalise the proceedings since the vesting order had been made, the respondent (the petitioner) applied to amend the creditor's petition to substitute the name of Standard Chartered Bank Malaysia Bhd (the successor) for Standard Chartered Bank (the predecessor). This is provided for by the vesting order and s 50 of BAFIA.

[12] The appellant contended that the respondent's application to amend in the present appeal is to substitute another party to replace the respondent in the petition is not allowed under the Bankruptcy Act 1967 or the Bankruptcy Rules 1969. The respondent in naming the respondent in the creditor's petition made a mistake and that is a nullity and incurable. In the present appeal, the judgment against the appellant was obtained by Standard Chartered Bank on 13 June 1987. When the appellant failed to pay the full judgment sum, Standard Chartered Bank requested

the court, on 1 October 1992, to issue a bankruptcy notice against the appellant. All these were done before the vesting order was made. The request for the bankruptcy notice was made pursuant to s 3(1)(i) of the Bankruptcy Act 1967 which provides:

> 3. Acts of bankruptcy
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> (1) A debtor commits an Act of bankruptcy in each of the following cases:
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> ...
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> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order (with interest quantified up to the date of the bankruptcy notice) or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malayisa, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
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> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

[13] From the above, the whole purpose of issuing the bankruptcy notice was to establish an act of bankruptcy on the part of the appellant. In order to file a creditor's petition against the appellant, Standard Chartered Bank had to establish an act of bankruptcy by the appellant. The appellant then applied to set aside the bankruptcy notice. All these took place before the incorporation of Standard Chartered Bank Malaysia Bhd and before the vesting order was made. The application to set aside the bankruptcy notice was dismissed on 27 June 1995. By then Standard Chartered Bank Malaysia Bhd had been incorporated and the vesting order was made. It was under that vesting order that Standard Chartered Bank ceased its operations in Malaysia, and the newly incorporated Standard Chartered Bank Malaysia Bhd took over the full operations of Standard Chartered Bank in Malaysia in accordance with the vesting order. In our view, because of the delay, the creditor's petition which was based on the bankruptcy notice could only be filed by the respondent after 27 June 1995, the date the application by the appellant to set aside the bankruptcy notice was dismissed. We are also of the view that the creditor's petition could not be in the name of Standard Chartered Bank Malaysia Bhd because the bankruptcy notice was issued in the name of Standard Chartered Bank, even though the vesting order had taken effect. The respondent had to name Standard Chartered Bank as the judgment creditor in the creditor's petition as provided for under s 4 of the Bankruptcy Act 1967:

4. Jurisdiction to make receiving order

Subject to the conditions hereinafter specified, if a debtor has committed an act of bankruptcy, the Court may on a bankruptcy petition being presented, either by a creditor or by the debtor make an order for the protection of the estate, which order is in this Act called a receiving order.

[14] Section 5(1)(c) provides any restriction in presenting a creditor's petition. Section 5(1)(c) reads:

5. Conditions on which creditor may petition

(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless —

...

(c) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition; and

...

[15] As we have stated earlier, Standard Chartered Bank could not present the creditor's petition within the stipulated time because of the appellant's application to set aside the bankruptcy notice which was dismissed only on 27 June 1995. The respondent filed the creditor's petition on 5 September 1995, in the name of Standard Chartered Bank, so as to comply with s 5(1)(c). Standard Chartered Bank Malaysia Bhd could not be named as a judgment creditor because the bankruptcy notice was in the name of Standard Chartered Bank. After all the requirements had been met by Standard Chartered Bank and the creditor's petition had been filed, it is, in our view, only appropriate for the respondent to amend the petition by substituting the name of Standard Chartered Bank Malaysia Bhd for Standard Chartered Bank because of the vesting order. This was what the respondent did when they filed the summons in chambers dated 23 August 1996. With the amendment it would be easier and convenient for the receiver to deal with the locally incorporated Standard Chartered Bank Malaysia Bhd. The amendment was not due to any error or mistake but to give effect to the vesting order. *Leong Moh Sawmill*'s case made it clear that Standard Chartered Bank could continue as a petitioner without the necessity to make an application to amend. The respondent was of the view that after the vesting order was made, it is more appropriate that Standard Chartered Bank Malaysia Bhd be named as the creditor, to which we agree.

[16] The appellant contended that there is no provision in the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 to enable the respondent to make the amendment. The learned judge in the court below cited rr 274 and 276 of the Bankruptcy Rules 1969 to justify the amendments made. The rules provide:

274 Effect of non-compliance with Rules

Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such

proceeding may be set aside either wholly or in part as irregular and amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

...

276 Rules of the High Court applicable in event of lacunae

In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, mutatis mutandis.

[17] We are of the view that the learned trial judge was correct in his application of those rules. Anyway, we are of the view that the vesting order dated 28 April 1994 is more than enough to allow the application to amend without resorting to the rules. We find there is no merit in the appellant's appeal.

[18] The appeal is hereby dismissed with costs.

Appeal dismissed.

Reported by John Paul Simon